EXHIBIT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

HERMÈS INTERNATIONAL, et al.,

Plaintiffs,

v. 22 Civ. 384 (JSR)

MASON ROTHSCHILD,

Defendant. Trial

----------x

New York, N.Y.
February 6, 2023
9:30 a.m.

Before:

HON. JED S. RAKOFF,

District Judge
-and a Jury-

APPEARANCES

BAKER & HOSTETLER LLP
Attorneys for Plaintiffs
BY: DEBORAH A. WILCOX
OREN J. WARSHAVSKY
GERALD J. FERGUSON

HARRIS ST. LAURENT & WECHSLER LLP
Attorneys for Defendant
BY: ADAM B. OPPENHEIM
JONATHAN A. HARRIS

LEX LUMINA PLLC
Attorneys for Defendant
BY: RHETT O. MILLSAPS, II
CHRISTOPHER SPRIGMAN

But I did add to Instruction No. 9, where I am describing the basic claims, a sentence to flag the First Amendment defense was coming. I think that was a fair resolution of the competing arguments.

Now, the more I thought about the *Rogers* test and the various cases not just in the Second Circuit but elsewhere that have elaborated and expanded the *Rogers* test over the weekend, the more I thought that on the facts of this case the real question is the defendant's intent.

Because while both *Rogers* and the related cases speak in, frankly, less than clear terms like "explicitly misleading" or "artistically relevant" and the like, the real question here, so far is the defense is concerned, is did Mr. Rothschild intend to mislead? In which case, of course, he has no First Amendment protection, any more than a con man has First Amendment protection from telling lies to the public to make money. Or did he not intend to mislead, in which case I think there can be no question that there was at least some artistic aspect to what he was offering.

As indicated in the instruction by his covering the Birkin bags with fur, he says he covered it with fur to show how ridiculous the consumer interest in Birkin bags was and the plaintiff says, no, it was just part of his whole way to try to sneak in as he sought to dupe the public.

They would be fair arguments to the jury, but that all

goes to his intent. That's why I said I think the focus is really on intent.

So I try to capture that, but I have added some additional words since I sent this to you on Saturday to the third paragraph of Instruction No. 14. Everything else will remain exactly as it is, and all objections thereto are preserved.

But here is now what I have for 14:

"It is undisputed that the MetaBirkins NFTs, including the associated images, are in at least some respects works of artistic expression, such as, for example, the addition of the total fur covering on the Birkin bag images. Given that, Mr. Rothschild is protected from liability on any of Hermès' claims unless Hermès proves by a preponderance of the evidence that Mr. Rothschild's use of the Birkin mark was not just likely to confuse potential consumers, but was intentionally designed to mislead potential consumers into believing that Hermès was associated with Mr. Rothschild's MetaBirkin projects. In other words, if Hermès proves that Mr. Rothschild actually intended to confuse potential customers, he has waived any First Amendment protection."

I think, as will be obvious, that doesn't use some of the buzzwords from *Rogers* and related cases, but I think the whole *Rogers* issue in this case turns on his intent.

So let me hear any comments on the new version of

misleading conduct, but it does relate to an intent to associate versus the intent to cause confusion. I think you might have addressed that with this.

THE COURT: I use the word "associated" in the new version, yes.

MS. WILCOX: Okay. Thank you.

MR. SPRIGMAN: Your Honor, just in response to that last quickly. Yes, the dilution cause of action does require an intent to associate, but in addition, it requires harm to the mark. It requires an impairment of the mark's distinctiveness. So we think that your instructions as they stand make that clear to the jury, or at least clear enough. These are lay people, and this is complicated.

But back to the instruction itself, we here at this table believe that the instruction gives the jury words they can use to actually apply the principle, and we are satisfied with it.

That said, Judge, we do remain, we have remaining arguments on the JMOL and in particular something that I think is central to the relationship between *Rogers* and this case that I would just like at some point to get to.

THE COURT: If we had had more time right now, I was going to hear the further argument on the Rule 50 motions, but as I promise you, you will have that opportunity before I rule.

MR. SPRIGMAN: Thank you, your Honor.

MR. SPRIGMAN: Your Honor, on Friday you mentioned that we will have additional argument on JMOL.

THE COURT: This is the moment.

MR. SPRIGMAN: It is down to intent, your Honor. You made it clear in instruction No. 14, right or wrong, that this case comes down to Mr. Rothschild's intent. In fact, you set a very high standard for Hermès to establish that intent.

That intent is that Hermès must prove that Mr. Rothschild's use of the Birkin mark was not just likely to confuse potential consumers, but was intentionally designed to mislead potential consumers into believing that Hermès was associated with Mr. Rothschild's MetaBirkins project.

Now, your Honor, we agreed to that instruction because we understood, we acknowledged based on last Friday's exchange that I had with you and based on the hypothetical that you offered to me that your concern was that someone who is just basically a scammer should not be taking advantage of First Amendment protection to perpetuate a scam.

We understand that, your Honor. Right or wrong as a matter ever law, we understand the concern. Based on that concern, and based on the way that you revised your instruction to reflect it, I want to give you three reasons, your Honor, why in my view no rational jury could find on the objective evidence in this case, whether they believe Mr. Rothschild or not, no rational jury could find on the objective evidence in

this case that Mr. Rothschild intentionally designed his MetaBirkins project, intentionally designed his use of the Birkin mark or the Birkin trade dress to deceive.

Now, I have three points. I think I can make them quickly.

At the end, I am going ask you to grant us judgment as a matter of law on all of these claims.

First, Mr. Martin, the 30(b)(6) witness for this client, has admitted on the stand that there are no explicit statements ever made by Mr. Rothschild inviting people to believe, to conclude that Hermès was connected with the MetaBirkins art project, no explicit statements in public, no explicit statements in private. None.

Now, that is very important, your Honor, because the *Rogers* case, whether we agree on it or not -- and I can talk to you, your Honor, about that. I have done a lot more thinking over the weekend. I think I have additional things I can tell you about that, but forget it.

Whatever we think about the precise meaning of *Rogers* and its relationship with *Twin Peaks*, those cases are clear that the statements must be, the use of the mark must be explicitly misleading.

The fact that there are no explicit statements in this case where Mr. Rothschild went out to the people or even his private contacts and said that his project has anything to do

MR. SPRIGMAN: That's my second point.

Here's my third and to me, your Honor, the most important. This is a First Amendment case. The First Amendment is supposed to provide all of us, including Mason Rothschild, when he makes his art, with breathing room. The First Amendment is not supposed to be a hunting license for companies like Hermès to pick out from thousands of texts and nitpick to death in a courtroom things that Mason Rothschild says to his buddies in private. That's what so much of the testimony in this case has been about, trying to paint Mr. Rothschild as a scammer.

I would submit to you, your Honor, that if this case is about intent, as you have made it to be, then if the First Amendment is going to have its day in this courtroom, it should be with you. And the way you should do it, I'm asking you, is to give Mr. Rothschild and artists like him who may not guard every word, who may not think in advance of any possible misuse and permutation that can be made by the people that they've angered, give them the breathing room to be artists and not lawyers.

Mr. Rothschild gave an interview to *Yahoo! News*. And you may remember, your Honor, months and months and months ago, when my colleague Rebecca Tushnet gave an argument to you on a motion to dismiss, the other side made a big deal about that *Yahoo! News* interview. That *Yahoo! News* interview, I will

bucks, you know, a minimum of 12,000 bucks, like they said. So I said, Let me see if I can charge, like, almost nothing for them, like, 450 bucks, and see what the people do with them and see what they value. Is it the image or, like, the product?"

Okay. That's the experiment. That's what he said in the *Yahoo! News* interview; that's what he said on the stand. It's been consistent.

This point about collaboration, you know, your Honor, I've been puzzled by this point from the start. Mason Rothschild never made -- he never lied about having the collaboration. He wanted a collaboration; he told people he was working on it. He was working on it. He was calling people trying to get to Hermès because, you know, to be truthful, your Honor, he was puzzled as to why they were upset about this.

Artists collaborate with Hermès all the time. Hermès spent time telling the jury about how they collaborate with artists. The idea that Mr. Rothschild couldn't collaborate with them or couldn't possibly think that he could collaborate with them doesn't stand up to the evidence that Hermès itself has introduced in this courtroom. It may be that Hermès considers him unworthy, but, you know, that's not Mr. Rothschild's fault nor is it something that he necessarily understands.

Look, your Honor, again, the word "explicit" appears

in *Rogers*. The word "explicit" appears in *Twin Peaks*. It is the test. This word "explicit" has got to do something. And the thing that it has to do in this case is that it has to have you asking yourself, did Mason Rothschild ever explicitly tell anybody, public or private, that his MetaBirkins were connected in any way with Hermès? He never said anything public. He never said, for example, your Honor, I'm going to name this project MetaBirkins by Hermès. He never did that. He never did this privately. He never said to someone, when they said, Hey, does this have anything to do with Hermès? He never said, Yeah, it does. Or, you know, They are sponsoring it or they are licensing it or I have their approval. He never said anything like that.

What they're reduced to, what Hermès is reduced to, is taking isolated bits of flotsam and jetsam in, I'm sorry, you said several 100 text chains. It's thousands and thousands and thousands of exchanges within those several 100 text chains. And they are cobbling together a narrative that, to be truthful, I mean, your Honor, is -- it is a concoction.

If you allow this case to proceed -- I mean, it's gone to the jury, but I'm asking you for a JMOL so that we do not get liability for First Amendment protected artistic speech based on a concoction. We should limit liability in these instances to explicit statements.

The rule, your Honor, after hearing you on Friday, I